Supreme Court, U.S.
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90-1439
No._____

In The

Supreme Court of the United States

October Term, 1991

MOHAB DIMYAN,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Whether the Writ should be granted to correct an erroneous ruling on instructing the jury that a government witness was, or could be found to be an accomplice whose testimony had to be carefully scrutinized?

Whether the Writ should be granted to harmonize divergent decisions in the Circuit Courts of Appeal?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit affirming the conviction of Mohab Dimyan is set forth at Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit, affirmed Petitioner Mohab Dimyan's conviction on January 11, 1991. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth Amendment of the United States Constitution. (See Appendix B).

STATEMENT OF THE CASE

On March 10, 1989, two packages entered the United States from Pakistan bearing Australian stamps. The packages were addressed to Vic Forster at 167-08 Highland Avenue. Gerald Adderly, an employee of the United States Customs Service assigned to inspect foreign mail suspected of carrying contraband, noticed the packages and decided they were unusual enough to warrant inspection. He opened the packages and discovered they contained heroin which was later determined to weigh 845 grams.

On March 13, 1989, Special Agent Timothy O'Brien and Investigator Gerald Heller of the United States Customs Service met for the purpose of removing the heroin from the packages and creating a "sham" package for a controlled delivery. On March 15, 1989, Joseph Adiano, a United States Postal Inspector, attempted to make a controlled delivery. Prior to leaving the Jamaica, Queens, post office to deliver the packages a special telephone line was set up. The telephone number corresponding to this telephone line was left on two receipts that Adiano was to leave in the mailbox at 167-08 Highland Avenue if nobody was home to accept delivery. Adiano went to 167-08 Highland Avenue and rang the door bell. Nobody answered the door and there was no evidence that a Vic Forster lived

at that address. Nevertheless Adiano left the receipts, with the phone number, in the mail box at that address.

On March 28, 1989, an individual with a "foreign" accent called the designated telephone number and asked about the two packages. The person was told to call back later when the packages were located. Later that afternoon a second telephone call was received from a man with a foreign accent. He was told the packages were located and could only be picked up by Vic Forster. The person indicated his name was Vic Forster and he would come by the next day to pick up the packages.

On April 1, 1989, Petitioner Mohab Dimyan, Qamar Yousufzai, and Marie Janik traveled to New Jersey together. Janik was surprised to see someone in the car besides Dimyan and claimed she did not know Yousufzai and had never been introduced to him. Janik had known Dimyan for a little over four years. She was a customer at his grocery store and owed him a considerable sum of money as a result of his extending her credit. She also had various other financial problems. As a result she approached Dimyan in March, 1989, and inquired whether he knew of anywhere where she might get a loan. Dimyan recommended an attorney in New Jersey and at Janik's request had agreed to drive her to the attorney's office on April 1, 1989.

The three individuals, along with Janik's husband drove to New Jersey where they met someone at a diner and had breakfast. They then went to the attorney's office where Janik had some discussions about obtaining a loan but she was turned down. On their way back to New Jersey, Janik said she was asked by Dimyan to call the post office and see if it was still open. (Dimyan had previously asked her about transferring packages from one post office to another since he knew Janik was employed by the postal service for a long time.)

They drove directly to the Jamaica Post Office without actually calling to find out if it was open.

When they discovered the post office was open, Dimyan asked Janik if she would pick up something for him. She agreed and asked for the receipts which were handed to her by the driver. Janik went into the post office and presented her post office identification to the person at the window. She was told the person whose name was on the receipt must sign for them for her to pick them up. She returned to the car and Yousufzai, who was talking on a pay phone, signed the slips. Janik then went back into the post office to again attempt to pick up the parcel.

While Janik was outside getting the receipts endorsed, Incorvaia, a Postal employee working on investigations, was told that someone had approached the window trying to pick up the sham packages. He immediately tried to contact the Customs agents but was unsuccessful. Instead he stalled Janik and told his people to tell her to return on Monday. As Janik was leaving the building Incorvaia stepped outside and observed Janik and two "gentlemen of foreign descent" get into a car and drive off.

Meanwhile, Janik returned to the car and handed the slips back to Yousufzai, at the same time telling him he would need to try again on Monday. Janik expressed some concern as to whether the packages might have been returned to the sender but Yousufzai insisted that the packages were at the post office. Janik was then asked if she would check on the packages on Monday and when she agreed Yousufzai wrote out the information on a slip of paper and handed it to Janik. The driver (Yousufzai) then warned Janik that if the post office asked too many questions she should forget about the whole thing. Janik got upset at this point and decided, although she did not tell anyone, that she would not pick up the packages because she was not sure they were only books.

On Tuesday, April 4, 1989, Joseph Adiano, the postal inspector, called Marie Janik to find out if she was going to come by the post office to pickup the packages she tried to get on Saturday. Janik requested that the packages be transferred from the Jamaica branch to the Main Street branch of the post office and the person on the phone agreed. That evening Janik entered the Main Street branch of the post office, picked up the two packages and began to leave. Before she got to the door she was stopped by Customs agents and place under arrest.

Once under arrest Janik was immediately interrogated. She denied knowing the packages contained heroin and expressed concern for her job. She stated that she was merely doing a favor for Dimyan and his friend the driver (Yousufzai). Janik agreed to call Dimyan and arrange for him to pick up the packages. After setting up a tape recorder at Janik's house to record the conversation Janik telephone Dimyan, who agreed to pick up the packages. About fifteen minutes later, Dimyan called Janik and told her he would be late because he had to stop to pick up Yousufzai.

Dimyan arrived at Janik's house and picked up the packages. After exchanging a few pleasantries he left Janik's house and proceeded to his truck. Once Dimyan put the packages in his truck he was placed under arrest. Dimyan told the Customs agents there were only books in the packages and agreed to deliver the packages to the "real guy" to whom the packages belonged. Dimyan and the Customs agents proceeded to Dimyan's house and waited outside until Yousufzai arrived. When Yousufzai arrived, he too was placed under arrest and $4,000 was confiscated from his car.

Defendant's Case

Dimyan testified on his own behalf and presented a variety of witnesses. They testified that Dimyan knew Yousufzai from

previous business transactions. Dimyan had delivered clothing for him and had once started a business with him. One witness testified that he had known Dimyan for over fifteen years and never knew him to do anything unlawful.

Dimyan testified that his business involved trucking and that as a part of his business he frequently picked up and delivered packages for a number of his customers. On March 26 or 27, 1989, Qamar Yousufzai called Dimyan and asked him some questions about medical books that were mailed to Yousufzai and never delivered. He asked Dimyan to call about the packages and he agreed. When he called, the post office eventually told him the packages were there, so Dimyan called Yousufzai back and told him he could pick up the packages. On March 31, 1989, Maurice Youssel, Dimyan's brother-in-law, received a telephone call from Yousufzai. Yousufzai asked him if he could pick up two packages for him tomorrow. Youssel testified he told Yousufzai he was too busy and could not pick them up.

On March 31, 1989, Dimyan was busy delivering 196 cartons of merchandise for Paul Anand. The merchandise was to be loaded on a truck at the Flying Tigers terminal at Kennedy Airport and delivered to somewhere in Pennsylvania. Dimyan made arrangements for his son, Maged Dimyan, a college student to meet him at the airport, help load the truck, and make the delivery to Pennsylvania. At the airport Dimyan was met by his son, Anand, and to his surprise Qamar Yousufzai. Yousufzai tried to get one of Anand's workers, Rameesh, to pick up the packages but Rameesh apparently refused. Yousufzai then began to pester Dimyan to do him a favor and pick up the packages but he refused because he was busy. Finally Yousufzai called Dimyan at home that night and asked him to come along for the ride to New Jersey to allegedly inspect his car.

Dimyan had arranged to drive Marie Janik to New Jersey on April 1, 1989, so she could apply for a loan. Dimyan had called an acquaintance in New Jersey, Charles "Chick" Ferraro and made an appointment for Janik with an attorney involved in the mortgage business. Apparently Janik was continuously having financial problems and owed both Dimyan and a friend of his money.

On April 1, 1989, Dimyan met with Janik and her husband and introduced them to Yousufzai. They then all left to meet Ferraro at a diner in New Jersey. From the diner they proceeded to the attorney's office where Janik was turned down for a loan. Yousufzai was present when Janik met with the attorney. Everyone returned to the car and proceeded back to Queens. In the car Janik announced she wanted to stop at the post office on the way home. Yousufzai went there after Janik assured them it would be open. When they arrived Janik took the receipts from Yousufzai and attempted to retrieve the two parcels. Janik quickly returned to get Yousufzai's signature on the receipts and tried once again to pick up the packages. Janik returned without the packages and said they were unable to find them. She volunteered to call about the packages on Monday and took down the information.

On April 1, 1989, Janik called Dimyan and told him she had the packages. Dimyan called Yousufzai and told him Janik had the packages and Yousufzai asked him to pick up the packages. Dimyan went to Janik's house, picked up the packages, and placed them in his car. Customs agents placed Dimyan under arrest and asked him if he knew what was in the packages. He said he did not know what they contained and he was upset because he felt his life was ruined. Dimyan agreed to deliver the packages to Yousufzai. The delivery was completed outside of Dimyan's house and Yousufzai was arrested. Dimyan denied he knew, or was ever told, there was heroin

in the packages and testified he never expected to be paid for picking up the packages for Yousufzai.

REASONS FOR GRANTING THE WRIT

The writ should be granted to rectify the denial of a fair trial and to resolve a conflict in the Circuits as to the requirement that upon request the court should instruct the jury that accomplice or Co-Conspirator testimony should be subjected to close scrutiny.

At trial, Marie Janik testified that she had participated in the efforts to pick up the packages at the Post Office. On April 1, 1989, Janik, her husband, Dimyan and Yousufzai traveled to New Jersey to see a lawyer about a possible loan for Janik. On the way back from New Jersey, Janik was asked by Dimyan to call the Post Office to see if it was still open. Without making this call, they drove directly to the Jamaica Post Office. The Post Office was open and Dimyan asked Janik to pick up something for him and the receipts for the packages were given to her by Yousufzai. Janik went into the Post Office. She was told that the person in whose name the receipts were made out had to sign for the packages. She went back to the car, where Yousufzai signed the slips. Janik again went in to get the packages. Unable to get the packages, she returned to the car and told Yousufzai that he would have to try again on Monday. Janik was asked to check on the packages on Monday and she agreed. Yousufzai then warned her that if the post office people asked questions, she should forget the whole thing. Janik testified that she was very upset because she suspected that the packages contained something other than books. Despite these concerns, Janik, upon being called on April 4, 1989, arranged to and did pick up the packages from the Main Street branch of the Post Office where she was arrested.

Based upon this testimony, defense counsel requested that the Court instruct the jury on accomplice or unindicted co-conspirators' testimony. (Defendant Dimyan's Request to charge #10-11). The Court refused to give such instruction to the jury because Janik was "not an unindicted co-conspirator,".

In the circumstances of this case, the failure to give such an instruction was reversible error.

The first matter is whether Janik was a co-conspirator or an accomplice and second whether, if error, the failure to give this instruction requires reversal of the conviction.

The acts of Janik clearly make her an accomplice or co-conspirator. She had as much information as Dimyan, was told to forget the whole thing if questions were asked, and had her own personal suspicions. Despite all of the above, she went ahead with arranging the pick-up and did actually pick up the packages. In testifying, Janik could not deny possession or furtherance of the conspiracy, but could as Dimyan, rely solely on lack of knowledge. Given the almost identical factual basis, if, as has been held in the Second Circuit below, a conscious avoidance instruction on Dimyan's knowledge was proper, the same theory applied to Janik. *United States v. Mang Sun Wong*, 884 F.2d 1537, 1541, (2d Cir. 1989) *cert. denied*, 110 S. Ct. 1140 (1990), *United States v. Guzman*, 754 F.2 482, 489, (2d. Cir. 1985) *cert. denied*, 474 U.S. 1054 (1986). Thus, the jury should have been instructed either that Janik was an accomplice as a matter of law or as a matter for the jury to find, and that, in the second circumstance, depending on the jury's finding, that it could apply the instruction on accomplice testimony to Janik.

In the opinion below, after finding that a conscious avoidance instruction as to Dimyan was properly given to the jury, the Second Circuit appears to accept that the accomplice instructions as to

Janik's testimony should have been given, but that the "failure to give a special charge to this effect is not reversible error because no substantial prejudice resulted from the omission. See *United States v. Slocum*, 695 F.2d 650, 659 (2d Cir. 1982) *cert. denied*, 460 U.S. 1015."

It is correct, that the Second Circuit adheres to a substantial prejudice rule, even where a proper and timely request for the instruction is made. However, other Circuits are far more expansive in affording an accused the right to accomplice instructions.

Where accomplice testimony is totally uncorroborated, the failure to give the the proper instruction is plain error. *United States v. Windom*, 510 F.2d 989 (5th Cir. 1975) *cert. denied* 423 U.S. 863, *United States v. David*, 439 F.2d 1105 (9th Cir. 1971), *United States v. Hill*, 627 F.2d 1252 (10th Cir. 1980).

There are a number of cases which, as this one, fall somewhere in between a total lack of corroboration and full corroboration of the important elements of the accomplices' testimony.

Thus, where much, as here, of the testimony of an accomplice was uncorroborated, the failure to give the proper instruction was reversible error *United States v. Wasco*, 473 F.2d 1281, 1284-85 (7th Cir. 1973), *United States v. Levi*, 177 F.2d 827, 831 (7th Cir. 1949), *United States v. McCabe*, 720 F.2d 951 (7th Cir. 1983). Indeed, the Seventh Circuit relies upon a "substantial influence" test for reversible error and will reverse even if there is only a grave doubt as to a "substantial influence" of the error.

Janik's testimony was the only direct evidence of guilty knowledge by Dimyan. *United States v. Bernal*, 814 F.2d 175 (5th Cir. 1987). Here, testimony about the events in the car on April 1, 1989 (including the "forget about it if questions are asked"), realistically constitute the sole evidence of either actual knowledge

or conscious avoidance. The prosecutor stressed Janik's testimony in his arguments for giving the conscious avoidance charge and it was heavily relied upon by the Court in granting the request and was stressed in the prosecution summation-in-chief.*

In the context of the defense of lack of knowledge, Janik's testimony was crucial and should have been properly evaluated by the jury as having been given by an accomplice with reason to fear prosecution and to want to curry favor with the government.

If there were any doubt as to the prejudice caused by the failure to give this instruction, and there should not be, it is totally obviated by the fact that the Court did instruct the jury on the defendant as an interested witness (Gov't request #16). "It is fair to say that the interest of this defendant in the outcome of this case is of a character which is possessed by no other witness. And that kind of an interest creates a motive to testify falsely." On top of this, the prosecutor in his summation pointed out the disparity between Dimyan's and Janik's motives to lie and told the jury to weigh Janik's testimony "just the way you weigh *every other* witness' testimony in this case," (emphasis added), even though as an accomplice, her testimony should not be weighed the same as every other witness.

Where a "defendant as an interested witness" charge is given, even with proper balancing language, it is especially important to give an "accomplice as a witness" instruction as well. *United States v. Beverly*, 562 F.2d 201, 204 (2d Cir. 1977) *cert. denied* 434 U.S. 1039 (1978), *United States v. Swiderski*, 539 F.2d 1246, appeal after remand, 548 F.2d 445 (2d Cir. 1977).

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* The prosecutor put the testimony of Dimyan and Janik into direct opposition: "Who do you believe (Janik or Dimyan)...Janik's reaction was reasonable..."

It is clear that much of Janik's testimony was uncorroborated and that under the Seventh Circuit's "substantial influence" of the error formulation, reversal of this conviction would be required.

Thus, both to set aside an improperly obtained conviction and to harmonize the diversity in the various Circuit's handling of this matter, the writ should be granted.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A - OPINION BELOW

89-cr-275
E.D.N.Y.
Judge Glasser

United States Court Of Appeals

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of January, one thousand nine hundred and ninety-one.

Present:

Honorable Ralph K. Winter,
Honorable Frank X. Altimari,
Circuit Judges,

Honorable Leonard D. Wexler
District Judge.[*]

/seal/
FILED January 11, 1991
Elaine B. Goldsmith, Clerk
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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[*] The Hon. Leonard D. Wexler of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix A

UNITED STATES OF AMERICA
Appellee,

v. **ORDER #90-1143**

MOHAB F. DIMYAN,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Mohab Dimyan appeals from a judgment, entered after a jury trial in the Eastern District, convicting him of narcotics violations under 21 U.S.C. §§ 841, 846 and 963. Dimyan was arrested in a government "sting" operation upon receiving a package containing heroin from Marie Janik, who claimed the package from a post office in Queens. After his arrest Dimyan agreed to cooperate with authorities by passing the package along to Shamin Yousufzai, who originally asked Dimyan to retrieve it for him at the post office. Yousufzai was arrested and indicted along with Dimyan, but pleaded guilty before trial. At trial, Dimyan's defense was that he was an unwitting dupe of Yousufzai's and Janik's, ignorant of the contents of the package.

On appeal, Dimyan argues that two aspects of the jury instructions deprived him of a fair trial. First, he claims that the evidence did not warrant the conscious avoidance charge given by the district court. Second, he contends that the district court erred in not giving an accomplice witness charge with respect to Janik, who testified for the government. We reject both allegations of error.

A conscious avoidance charge is appropriate where "the surrounding circumstances were such that reasonable persons could have concluded that the circumstances alone should have apprised defendant[] of the unlawful nature of [his] conduct." *United States v. Mang Sun Wong*, 884 F.2d 1537, 1541 (2d Cir. 1989) (quoting *United States v. Guzman*, 754 F.2d 482, 489 (2d Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986)), *cert. denied*, 110 S. Ct. 1140 (1990). Yousufzai's strange behavior with respect to the package was sufficient to create such circumstances. Yousufzai was continuously unwilling to retrieve the package from the post office himself, went to extreme lengths to find someone else to do the job for him, and waited nearly an hour during Janik's first unsuccessful attempt to claim the package. This behavior certainly would have alerted a reasonable person that the contents were not medical books, as he contended, but instead some type of contraband. *See Wong*, 884 F.2d at 1542-43; *United States v. Joly*, 493 F.2d 672, 676-77 (2d Cir. 1974).

In any event, the ample proof of actual knowledge renders any error harmless. *See United States v. Alvarado*, 838 F.2d 311, 314-17 (9th Cir.), *cert. denied*, 487 U.S. 1222 (1988). Dimyan was noticeably excited when Janik telephoned him with the news that she had secured the package and immediately went to pick it up from her. Upon doing so, he placed the package in the trunk of his car, not what one would ordinarily do with a light load of books. Finally,

Yousufzai had $4,000 ready in the front seat of his car upon delivery. All this could suggest to a reasonable juror that Dimyan was a knowing participant in a drug transaction.

We also reject Dimyan's second argument that the district court should have instructed the jury that Janik was an unindicted co-conspirator whose testimony may be prejudiced. While Janik may have had an incentive to cooperate with the government to avoid prosecution herself, the failure to give a special charge to this effect is not reversible error because no substantial prejudice resulted from the omission. *See United States v. Slocum*, 695 F.2d 650, 656 (2d Cir. 1982), *cert. denied*, 460 U.S. 1015 (1983). The district court gave a general instruction with respect to witness credibility, defense counsel argued Janik's credibility in summations, and, as discussed above, other evidence at trial supported a finding that Dimyan consciously participated in an illegal drug transaction.

The judgment of conviction is affirmed.

/signature
Hon. Ralph K. Winter, U.S.C.J.

/signature
Hon. Frank X. Altimari, U.S.C.J.

/signature
Hon. Leonard D. Wexler, U.S.D.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B - CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.